

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By **CHAIRMAN CINDY YOUNKIN**, on March 9, 2001 at 3:00 P.M., in Room 152 Capitol.

#### **ROLL CALL**

##### **Members Present:**

Rep. Cindy Younkin, Chairman (R)  
Rep. Rick Dale, Vice Chairman (R)  
Rep. Gail Gutsche, Vice Chairman (D)  
Rep. Dee Brown (R)  
Rep. Gilda Clancy (R)  
Rep. Aubyn A. Curtiss (R)  
Rep. Larry Cyr (D)  
Rep. Ron Erickson (D)  
Rep. Christopher Harris (D)  
Rep. Linda Holden (R)  
Rep. Rick Laible (R)  
Rep. Jeff Laszloffy (R)  
Rep. Douglas Mood (R)  
Rep. Bob Story (R)  
Rep. Brett Tramelli (D)  
Rep. David Wanzienried (D)

**Members Excused:** Rep. Keith Bales (R)  
Rep. Rod Bitney (R)  
Rep. Bill Eggers (D)  
Rep. Joan Hurdle (D)

**Members Absent:** None.

**Staff Present:** Holly Jordan, Committee Secretary  
Larry Mitchell, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

##### **Committee Business Summary:**

**Hearing(s) & Date(s) Posted:** SB 146, 3/5/2001; SB 147,  
3/5/2001; SB 167, 3/5/2001

**Executive Action:** SB 159; SB 31; SB 146; SB 147

**EXECUTIVE ACTION ON SB 159**

*{Tape : 1; Side : A; Approx. Time Counter : 0.3}*

**Motion:** REP. DALE moved that SB 159 BE CONCURRED IN.

**Motion:** REP. GUTSCHE moved that AMENDMENT SB015903.alm ON SB 159 BE ADOPTED.

**Discussion:**

REP. GUTSCHE passed out the amendment **EXHIBIT**(nah54a01) and explained it.

Mr. Mitchell also explained the amendment.

REP. CURTISS asked if the committee is setting a precedent by being specific in (iii).

Mr. Mitchell stated, this was drafted to be very specific to address only the conservation license and to allow an easement for that specifically.

REP. LASZLOFFY stated he supports the amendments.

REP. CLANCY asked REP. GUTSCHE if she checked with Bud Clinch with DNRC and if he is ok with the amendments. REP. GUTSCHE stated yes.

**Vote:** Motion on the amendments carried unanimously.

**Motion/Vote:** REP. GUTSCHE moved that SB 159 BE CONCURRED IN AS AMENDED. Motion carried unanimously.

**EXECUTIVE ACTION ON SB 31**

*{Tape : 1; Side : A; Approx. Time Counter : 6.8}*

**Motion:** REP. DALE moved that SB 31 BE CONCURRED IN.

**Discussion:**

Two amendments were passed out **EXHIBIT**(nah54a02) and **EXHIBIT**(nah54a03).

REP. HARRIS asked to have Bud Clinch, DNRC, and Roy Andes, MonTrust, explain their positions on the amendments.

**Roy Andes, MonTrust**, explained both sets of amendments. He asked the committee to adopt the amendments.

**Bud Clinch, DNRC**, explained both sets of amendments. He stated the amendments are unnecessary.

**REP. STORY** moved to postpone executive action on SB 31 to proceed with the hearings.

**REP. YOUNKIN** stated, executive action on SB 31 will be postponed until after the hearings.

**HEARING ON SB 167**

**Sponsor:** SEN. EMILY STONINGTON, SD 15, Bozeman

**Proponents:** Jan Sensibaugh, DEQ  
Stephanie Nelson, Gallatin County  
Rod Fink, Retired Sanitarian, Small Counties  
Byron Roberts, Montana Building Association  
Joan Miles, Helena Health Department  
Sam Sampson, Jefferson County  
Susan Brueggeman, Lake County  
Paige Dringman, Montana Association of Realtors  
Anne Hedges, MEIC

**Opponents:** None.

**Opening Statement by Sponsor:**

*{Tape : 1; Side : A; Approx. Time Counter : 26.9}*

SEN. EMILY STONINGTON, SD 15, Bozeman, stated SB 167 is a revision of the of the sanitation and subdivision law. She gave a history of the bill. She explained the fiscal note.

**Proponents' Testimony:**

*{Tape : 1; Side : A; Approx. Time Counter : 31.1}*

Jan Sensibaugh, DEQ, submitted written testimony  
**EXHIBIT** (nah54a04).

**Stephanie Nelson, Gallatin County**, stated, this bill provides a much more active local role in the review of major subdivisions. It also provides and ensures that the Department of Health is informed early on in the development of a property.

**Rod Fink, Retired Sanitarian, Small Counties**, was a member of the consensus council for the past two years. He gave a history of the bill. He asked for a do concur.

**Byron Roberts, Montana Building Association**, stated, this has been a very continuous issue. This bill takes care of everyone's concerns. He gave a history of the bill. He asked for a do concur.

**Joan Miles, Helena Health Department**, stated, on behalf of Lewis and Clark, Butte-Silver Bow, Cascade, Flathead, Yellowstone and Missoula City County Health Departments she urged the committee's support of the bill.

**Sam Sampson, Jefferson County**, submitted written testimony from Jane Jelinski, Montana Association of Counties **EXHIBIT(nah54a05)**.

**Susan Brueggeman, Lake County**, submitted written testimony **EXHIBIT(nah54a06)**.

**Paige Dringman, Montana Association of Realtors**, urged the committee to support SB 167.

**Opponents' Testimony:** None.

**Questions from Committee Members and Responses:**

***{Tape : 1; Side : A; Approx. Time Counter : 47.5}***

**REP. STORY** asked **Ms. Sensibaugh**, regarding section 6 of the bill, are there any important activities ongoing now without this legislation? **Ms. Sensibaugh** stated, DEQ has not done enforcement in subdivisions because the fees weren't in place. There have been some situations where DEQ felt they needed to pursue enforcement. This is enforcement against developers who are building prior to getting approval. There are two enforcement actions being pursued now. **REP. STORY** asked if DEQ will have to increase their fees to expand their scope of work. **Ms. Sensibaugh** stated, DEQ may have to.

**REP. HARRIS** asked **Ms. Sensibaugh**, regarding page 5, line 11, of the bill, what is the certification process, who does it and what is the result? **Ms. Sensibaugh** stated, DEQ does the process which is set up through the counties. **REP. HARRIS** asked, was that an issue of some contention about having the department being the certifier? Did the local governments think they have plenty of expertise on their own? **Ms. Sensibaugh** stated no, that wasn't a point of contention. What was a point of contention originally

was DEQ wouldn't certify the counties to do that because they didn't have the expertise. Now DEQ ensures they have the expertise and everything is fine.

**REP. GUTSCHE** asked **SEN. STONINGTON** how this bill differs from **REP. FUCHS** HB 585. **SEN. STONINGTON** stated she hasn't seen the bill. They need to be looked at together. She deferred the question to **Ms. Sensibaugh**. She went over the differences in the two bills. **REP. GUTSCHE** asked, can the two work together? **Ms. Sensibaugh** stated no.

**REP. STORY** asked **Ms. Dringman** are the first two sections of the bill the sections which caused a problem? **Ms. Dringman** stated, sections 1, 2 and 3 caused the problem. **REP. STORY** asked, what is the purpose of section 1? **Ms. Dringman** stated, it would address a situation where, for example, someone was putting a sewer system on a 5 acre lot and they would have a certain area within that lot for a drain field. If it were subsequently divided there would be a situation where that drain field may extend onto someone else's property. An easement would need to be obtained in that situation. **REP. STORY** asked does section 1 require that the seller provide a plat or certificate of survey, is that something that wasn't being done before? **Ms. Dringman** stated, some people don't pay any attention to the plat. The DEQ wanted some process by which there was an assurance that the subdivider and the owner of the lot would give a subsequent purchaser notice. This was the solution.

**REP. YOUNKIN** asked **SEN. STONINGTON** what happens where you have two bills that conflict? **SEN. STONINGTON** stated, she is not sure but the leadership should be alerted of this. SB 167 seems to be the preferred bill. She asked the committee to proceed with this bill and work on the two bills later.

**Closing by Sponsor:**

***{Tape : 1; Side : A; Approx. Time Counter : 57.4}***

**REP. STONINGTON** thanked all of the people who worked on the bill during the consensus process. **REP. HARRIS** has stated that he would carry the bill on the floor.

**HEARING ON SB 147**

**Sponsor:** **SEN. BOB KEENAN, SD 38, Bigfork**

**Proponents:** **Jan Sensibaugh, DEQ**

Opponents: None.

Opening Statement by Sponsor:

*{Tape : 1; Side : A; Approx. Time Counter : 58.6}*

SEN. BOB KEENAN, SD 38, Bigfork, stated this is a housekeeping bill. He turned the bill over to Jan Sensibaugh to explain.

Proponents' Testimony:

*{Tape : 1; Side : A; Approx. Time Counter : 60.2}*

Jan Sensibaugh, DEQ, submitted written testimony

**EXHIBIT**(nah54a07). *{Tape : 1; Side : B; Approx. Time Counter : 0.1}.*

Opponents' Testimony: None.

Questions from Committee Members and Responses:

*{Tape : 1; Side : B; Approx. Time Counter : 0.8}*

REP. STORY asked Ms. Sensibaugh, regarding section 3, why wasn't the tribal government included? Ms. Sensibaugh deferred the question to John Dilliard, DEQ. He stated, the public water supply program is an approved program from EPA and EPA does not recognize states authority to enforce the regulations within the reservations. They would be covered under Montana Law but they wouldn't be specifically mentioned in this. REP. STORY asked, in the event the Tribal Government bought land off the reservation to set up a facility, if the land was in Trust you may have a Federal issue but if it wasn't, would the state have any authority to regulate that? Mr. Dilliard stated, that would be a legal issue. He is not sure how that would work.

Closing by Sponsor:

*{Tape : 1; Side : B; Approx. Time Counter : 3.7}*

SEN. KEENAN closed.

HEARING ON SB 146

Sponsor: SEN. BOB KEENAN, SD 38, Bigfork

Proponents: Jan Sensibaugh, DEQ

Opponents: None.

Opening Statement by Sponsor:

*{Tape : 1; Side : B; Approx. Time Counter : 3.9}*

SEN. BOB KEENAN, SD 38, Bigfork, stated SB 146 is a clarification bill. REP. HOLDEN has agreed to carry these bills. He turned the bill over to Jan Sensibaugh to explain.

Proponents' Testimony:

*{Tape : 1; Side : B; Approx. Time Counter : 4.7}*

Jan Sensibaugh, DEQ, submitted written testimony  
**EXHIBIT** (nah54a08).

Opponents' Testimony: None.

Questions from Committee Members and Responses:

*{Tape : 1; Side : B; Approx. Time Counter : 7}*

REP. HOLDEN asked Ms. Sensibaugh to give the committee examples of certified operators for these projects. Ms. Sensibaugh stated, if the community has a public water supply system they have certified operators to operate their water treatment and sewage treatment plants. DEQ also certifies any place where there are many people who are serviced by the water or sewage system. REP. HOLDEN asked what their position title would be? Ms. Sensibaugh stated, they are the certified operators.

REP. STORY asked Ms. Sensibaugh how long does it take a person to become certified? Ms. Sensibaugh stated, as soon as they feel they are ready to take the test they can become certified. REP. STORY asked, is it the program at M.S.U. Northern that certifies? Ms. Sensibaugh stated, Northern provides the training program. REP. STORY stated he is concerned about the small operations. Are any of those people certified? Ms. Sensibaugh stated, they are all certified. REP. STORY stated he didn't want to get into a problem with the immediate effective date. Ms. Sensibaugh stated, this act doesn't change anything that is currently done.

Closing by Sponsor:

*{Tape : 1; Side : B; Approx. Time Counter : 10.2}*

**SEN. KEENAN** stated these bills do not form a difficult process. He asked for a do concur.

**EXECUTIVE ACTION ON SB 31**

***{Tape : 1; Side : B; Approx. Time Counter : 11.3}***

**Motion:** **REP. HARRIS** moved that **AMENDMENTS SB003101.alm and SB003102.alm ON SB 31 BE ADOPTED.**

**Discussion:**

**REP. ERICKSON** asked **Mr. Andes** to talk about the constitutionality of this bill and the amendments. **Mr. Andes** stated, the constitutionality issues arise out of the Law of Trusts. He gave a history of this.

**REP. YOUNKIN** asked **Mr. Andes**, if you were prosecuting people for trespassing in the early 90's how would those acts of trespass which may have begun in the mid 80's and run through the mid 90's, for a period longer than five years, affect someone's rights of prescription? **Mr. Andes** stated, there is no right of prescription against the state. **REP. YOUNKIN** asked if that is a code section or common law. **Mr. Andes** stated, he believes it is code section.

**REP. HARRIS** asked **Mr. Andes**, regarding the second part of the first amendment, do you agree that would be surplus issue? **Mr. Andes** stated no, it is broader.

**REP. DALE** asked **Mr. Andes**, as a prudent man have you thought through the actual ramifications of your amendments in terms of cost, etc.? **Mr. Andes** stated, he hasn't thought through all of the management ramifications. With these amendments in place the department has the ability to make those judgement calls.

**REP. BROWN** asked, why are we listening to all of this editorializing? She objected to the discussion.

**REP. HARRIS** stated, he asked the chair if it was possible to have **Mr. Clinch** and **Mr. Andes** present the amendments. This was to be completely fair to both sides of the issue.

**REP. STORY** stated he doesn't have a problem with the date being 1973. He does have a problem with most of the other amendments because they may create some problems. He explained those problems.



**REP. ERICKSON** stated that he would be in strong agreement with **REP. STORY**. He suggested the committee separate the amendments. He asked **REP. STORY** what he thinks about amendment #2.

**REP. STORY** stated that he agrees with the first half of one and the first half of two. He suggested the committee segregate the first half of one and number two.

**REP. ERICKSON** stated that is what he would like to do. Segregate the first half of one and number 2 on SB003102.alm. That is the crucial part.

**REP. HARRIS** stated he supports segregating the amendments. These amendments will help avoid litigation in the future.

**REP. DALE** asked **REP. HARRIS** if these amendments change the amount of money due the state. **REP. HARRIS** deferred the question to **Mr. Clinch**. He stated, it would not change the amount of money. The only thing that this bill does different, in historic easements vs. the regular easement process, is it exempts DNRC from MEPA.

**REP. YOUNKIN** stated, with the segregated amendments all that is being discussed is the change of date from 1973 to 1997.

**REP. DALE** stated, he opposes the amendment. A prudent man would go for the deal on the table and not put a whole lot of effort into something that may yield very little.

**REP YOUNKIN** asked **REP. STORY** to explain the change from 1973 to 1997. **REP. STORY** stated, when the bill was passed originally and the 1973 date was put in the legislature was just looking for a date that would pick up most of the people that had a problem. The date was one year after the adoption of the 1972 constitution because they felt that there had been some changes in the way things worked in the old constitution.

**REP. BALES** stated that he is against changing the date. One of the key ingredients is, if there is something in place how do you do an antiquity study, etc. The date should be left at 1997 to go from there. It would just cause more confusion to take this back to 1973.

**REP. YOUNKIN** asked **REP. HARRIS** if he is aware of any statutory provision which says you can't acquire an easement, across the state, by prescription, before 1997. **REP. HARRIS** stated, there is a general rule, you cannot acquire, against state property, a prescription. **REP. YOUNKIN** stated she believes that is true, after 1997, but prior to 1997 there was not a statute. **REP.**

**HARRIS** stated, if it isn't in the code it would certainly be in the common law.

**REP. STORY** stated, there was a problem in 1997 that people who had been using these rights-of-way for a long period of time, went to lenders to try to get mortgages and found out they didn't have a recorded easement. They went to the state to try and get a prescriptive easement and were told you can't get a prescriptive easement across state land.

**REP. YOUNKIN** explained what an easement by prescription is.

**REP. STORY** asked **Mr. Andes** for more insight on whether prescriptive easement is in code. **Mr. Andes** stated he does not know if it is a code section or common law. **REP. STORY** redirected the question to **Clive Rooney, DNRC** who stated that it is case law that has determined that you can't get a prescriptive right across state land.

**REP. DALE** stated, there is a window of time here. We are looking at a very limited set of entities that have these facilities in place. A small percentage of those are going to be the trespassers. Those people have a window of when they can do something. It is not worth it to chase that small percentage.

**REP. HOLDEN** stated, the Senate approved this and the date 1997 was the historic easement bill.

**Vote:** Motion on **AMENDMENT ON DATES** failed 9-11 with **Cyr, Eggers, Erickson, Gutsche, Harris, Hurdle, Story, Tramelli, and Wanzenried** voting aye.

**Vote:** Motion **REMAINING AMENDMENTS** failed 2-18 with **Brown and Harris** voting aye.

**REP. DALE** stated, his position on this is not driven by anything other than getting the situation solved.

**REP. ERICKSON** stated, the reason that he is going to vote against the bill is that it was a decent bill going into the senate and they made the decision to amend the date from 1973 to 1997 which was a mistake.

**REP. STORY** stated, the department intended to draft the bill at 1997, 1977 way a typo, that's why it was amended in the Senate.

Vote: Motion SB 31 BE CONCURRED IN carried 12-8 with Cyr, Eggers, Erickson, Gutsche, Harris, Hurdle, Tramelli, and Wanzenried voting no.

EXECUTIVE ACTION ON SB 146

*{Tape : 1; Side : B; Approx. Time Counter : 48.3}*

Motion/Vote: REP. STORY moved that SB 146 BE CONCURRED IN. Motion carried unanimously.

EXECUTIVE ACTION ON SB 147

*{Tape : 1; Side : B; Approx. Time Counter : 48.7}*

Motion/Vote: REP. BROWN moved that SB 147 BE CONCURRED IN. Motion carried unanimously.

**ADJOURNMENT**

Adjournment: 5:00 P.M.

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REP. CINDY YOUNKIN, Chairman

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HOLLY JORDAN, Secretary

CY/HJ

**EXHIBIT (nah54aad)**